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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,)	No. CR 10-0859 RS
)	
Plaintiff,)	MOTION IN LIMINE TO ADMIT
)	EVIDENCE OF ALLEGED VICTIM'S
v.)	SIMILAR CLAIMS OF
)	CONTEMPORANEOUS SEXUAL ABUSE
GARY HARDEMAN,)	BY OTHERS
)	
Defendant.)	Honorable Richard Seeborg
)	July 10, 2013
)	2:00 p.m.

INTRODUCTION

The alleged victim in this case has made highly doubtful claims of forcible rape by persons other than Mr. Hardeman that are contemporaneous with – and strikingly similar to – her claim against Mr. Hardeman. The Court should permit the cross-examination of the alleged victim as to these claims notwithstanding Federal Rule of Evidence 412. Exclusion of the evidence would violate Mr. Hardeman's constitutional rights, including the right to meaningful cross-examination, because the credibility of the alleged victim will be the key issue at trial and the other claims of sexual abuse are inextricably intertwined with those against Mr. Hardeman.

BACKGROUND

The alleged victim claims that in December 2007 Mr. Hardeman forcibly raped her after finding her on the street in Mexico due to her being abandoned by her mother. *See* Declaration of Daniel P. Blank (filed concurrently with this memorandum) [hereinafter "Blank Decl."] ¶ 2.

LIMINE TO ADMIT FALSE ACCUSATIONS

1 She also claimed that Mr. Hardeman called her by name and said he knew her mother even
 2 though she did not remember ever meeting him before, and that he then kept her in his hotel
 3 room for several days. *See id.* According to the alleged victim, in the first discrete incident of
 4 this narrative, Mr. Hardeman exposed his near-naked body to her, and then touched her body,
 5 but not her genitals. *See id.* In the second discrete incident, she claims that he proposed having
 6 consensual sexual intercourse with her, but she refused, and nothing more happened. In the third
 7 discrete incident, Mr. Hardeman supposedly suggested alternative sexual activity, but again she
 8 refused, and again nothing more happened. In the final discrete incident, the alleged victim
 9 claims that Mr. Hardeman took her to another location, specifically the U.S. Embassy. *See id.*
 10 After repeatedly denying in numerous interviews by psychologists, caseworkers and government
 11 agents that Mr. Hardeman ever had any actual sexual contact with her, the alleged victim
 12 changed her story to say that in the final discrete incident, just prior to taking her to the U.S.
 13 Embassy, Mr. Hardeman forcibly raped her. *See id.* No known forensic evidence or eyewitness
 14 testimony supports the alleged victim's claim of forcible rape against Mr. Hardeman. *See id.*
 15 Instead, substantial evidence suggests that the alleged victim has a history of serious mental
 16 illness, characterized by delusions and an inability to distinguish fantasy from reality. *See id.*

17 Significantly, Mr. Hardeman is not the only person against whom the alleged victim has
 18 made such claims of forcible rape in Mexico between December 2007 and June 2008. *See id.*

19 ¶ 3. Documents provided by the government in discovery and obtained by defense subpoena
 20 show that the alleged victim in this case has also similarly claimed that, during that time period,
 21 either "Juan" or "Carlos" or both:

- 22 • found her on the street in Mexico, after being abandoned by her mother;
- 23 • called her by name and claimed to know her mother, even though she did not
- 24 recall ever meeting him;
- 25 • kept her in a hotel room for several days;
- 26 • exposed his body to her and touched her body, but not her genitals;
- 27 • proposed consensual intercourse, but she refused and nothing more happened;
- 28 • suggested alternative sexual activity, but she refused and nothing more happened;

engaged in other sexual behavior; or (2) evidence offered to prove a victim's sexual predisposition." Fed. R. Evid. 412(a). The purpose of the rule is to prevent a defendant from suggesting that a victim's prior sexual activity or predisposition makes it more likely that she consented to the sexual misconduct with which he is charged. On its face, the terms of Rule 412(a) do not apply here. Mr. Hardeman is not seeking to introduce any evidence of the alleged victim's actual sexual behavior or predisposition. The theory of the defense is that, even if the alleged victim's prior claims of sexual abuse by others could be construed as "sexual behavior" by the alleged victim within the meaning of Rule 412(a), those claims are false, and no such behavior actually occurred. It is the alleged victim's predisposition to make false claims, not her predisposition for sexual activity, that is at issue. *See, e.g., Redmond v. Kingston*, 240 F.3d 590, 592 (7th Cir. 2001) ("A false charge of rape is not sexual conduct."). Thus, the Court should hold that Rule 412 is no bar to cross-examination of the alleged victim regarding her suspiciously similar, contemporaneous claims of forcible rape by persons other Mr. Hardeman.

The government is expected to take the position that these additional claims by the alleged victim are in fact true, despite the lack of any corroborating evidence, and that they should therefore be excluded under the provisions of Rule 412. However, even if Rule 412 did apply in this case, there is an express exception to that rule providing that "[t]he court may admit the following evidence in a criminal case: . . . (C) evidence whose exclusion would violate the defendant's constitutional rights." Fed. R. Evid. 412(b)(1)(C). For the reasons discussed below, the Court should admit the evidence.

II. EXCLUSION OF THE EVIDENCE WOULD VIOLATE HARDEMAN'S RIGHTS

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." U.S. Const. amend. VI. The Supreme Court has held that incorporated within the right to confrontation are two types of protections for a criminal defendant: "the right physically to face those who testify against him, and the right to conduct cross-examination." *Pennsylvania v. Richie*, 480 U.S. 39, 51 (1987) (citing *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985); *see also Davis v. Alaska*, 415 U.S. 308, 315-16 (1974) (explaining that the main and essential purpose of confrontation is to secure the

1 opportunity of cross-examination). Here, the exclusion of Mr. Hardeman's proposed cross-
2 examination of the alleged victim as to her highly questionable claims of sexual abuse by others
3 – which are strikingly similar to and contemporaneous with her claim against Mr. Hardeman –
4 would violate his constitutional right to confront the key witness against him.

5 The right to cross-examination “includes the opportunity to show [not only] that a
6 witness is biased, [but also] that the testimony is exaggerated or [otherwise] unbelievable.”
7 *Fowler v. Sacramento Cnty. Sheriff's Dept.*, 421 F.3d 1027, 1035 (9th Cir. 2005) (quoting
8 *Ritchie*, 480 U.S. at 51-52). In addition, “cross-examination may implicate the Sixth
9 Amendment even if it is not certain to affect the jury's assessment of the witness's reliability or
10 credibility.” *Id.* at 1036 (citing *Davis*, 415 U.S. at 317). Numerous courts have applied these
11 principles to hold that it is error of constitutional magnitude to preclude a defendant from cross-
12 examining the alleged victim about similar claims of sexual abuse by other persons where the
13 credibility of the alleged victim is central to the prosecution's case, particularly where the theory
14 of the defense is that the other claims are false and result from a similar motivation to make a
15 false claim against the defendant.

16 For example, where as here there is significant reason to believe that the claim of other
17 sexual abuse is false, and the credibility of the alleged victim is central to the case, courts have
18 not hesitated to hold that the defendant has a constitutional right to cross examine on that topic.
19 *See, e.g., Franklin v. Henry*, 122 F.3d 1270, 1273 (9th Cir. 1997), *rev'd on other grounds by*
20 *Payton v. Wofford*, 299 F.3d 815 (9th Cir. 2002) (en banc), (reversing conviction for sexual
21 abuse of a child where trial court precluded defendant from cross-examining alleged victim
22 regarding questionable prior claim of similar sexual abuse by another person since she was “the
23 only percipient witness” to the conduct charged against the defendant); *see also White v. Coplan*,
24 399 F.3d 18, 27 (1st Cir. 2005) (reversing conviction for aggravated sexual assault where trial
25 court precluded defendant from cross-examining alleged victims regarding three past accusations
26 of similar character, of which two were found to be “false to a reasonable probability” with a
27 “resulting plausible inference of a motive to deceive that could infect the present testimony”;
28 *Redmond*, 240 F.3d at 592-93 (reversing conviction for statutory rape where trial court precluded

1 defendant from cross-examining the alleged victim concerning a prior false claim that she had
2 been forcibly raped in order to show that she “would lie about a sexual assault in order to get
3 attention, and thus had a motivation to accuse him falsely”); *Averilla v. Lopez*, 862 F. Supp.2d
4 987, 1007-08 (N.D. Cal. 2012) (reversing rape conviction where trial court precluded defendant
5 from cross-examining the alleged victim concerning a prior false rape claim, since her testimony
6 was central to the prosecution’s case).

7 In particular, where as here the alleged prior incidents are close in time to the charged
8 conduct, courts have held that the evidence is admissible, notwithstanding Rule 412. *See, e.g.,*
9 *United States v. Stamper*, 766 F. Supp. 1396, 1402 (W.D.N.C. 1991) (in prosecution for statutory
10 rape, granting defendant’s motion to admit evidence of alleged victim’s previous allegations of
11 sexual abuse by three other men, notwithstanding Rule 412, where the charged conduct and the
12 prior incidents were separated by “just one year,” and the facts of the case suggested a
13 “contrived scheme of fabrication of the part of the complainant”) (citing 124 Cong.Rec.
14 H11,945, daily ed. Oct. 10, 1978 (statement of Rep. Mann, pertaining to Rule 412) (“In
15 determining the admissibility of such evidence, the court will consider . . . the amount of time
16 that lapsed between the alleged prior acts and the rape charged in the prosecution. The greater
17 the lapse of time, of course, the less likely it is that such evidence will be admitted.”)).

18 Even where the defendant cannot conclusively prove that the alleged victim’s claim of
19 other sexual abuse was false, and even where there may be some dissimilarities between the
20 incidents, the Ninth Circuit has held that it is constitutional error to preclude cross-examination
21 on the topic if the credibility of the alleged victim is central to the case. *See, e.g., Fowler*, 421
22 F.3d at 1039 (reversing conviction for molesting a minor since, “although the trial court
23 concluded that there was no ‘indication’ that [the alleged victim] actually overreacted or lied in
24 the prior incidents and the facts of the prior incidents were ‘very dissimilar’ from those here, in
25 fact there can be no doubt that the precluded cross-examination sufficient bore on [the alleged
26 victim’s] reliability or credibility such that a jury might reasonably have questioned it”); *see also*
27 *Holley v. Yarborough*, 568 F.3d 1091, 1099 (9th Cir. 2009) (reversing conviction for child
28 sexual abuse where the defendant was precluded from cross-examining the alleged victim about

1 claims of prior sexual abuse by others, even though trial court found “no evidence of the falsity”
 2 of the alleged victim’s claims and “significant dissimilarities” between the incidents, since
 3 “introduction of evidence that she had made prior claims of her own sexual appeal was clearly
 4 relevant to impeach” and defendant “did not need to show that the excluded statements were
 5 consciously or maliciously fabricated” in order for the admission of the evidence to be
 6 constitutionally required); *cf. Olden v. Kentucky*, 488 U.S. 227, 233 (1988) (reversing rape
 7 conviction where trial court precluded defendant from cross-examining alleged victim regarding
 8 her motive to falsely claim lack of consent in order to protect her current sexual relationship with
 9 her boyfriend since her testimony “was central, indeed crucial, to the prosecution’s case”).

10 Moreover, where as here the other claims of possible sexual abuse involved
 11 nonconsensual conduct rather than consensual conduct, the Ninth Circuit in *Fowler* explained
 12 that there could be no possible prejudice to the alleged victim in that case, Lara, from permitting
 13 the cross-examination, even if the claims were true:

14
 15 Other than as to her credibility, it is not clear how her testimony regarding the prior
 16 incidents would prejudice her at all. Although the prior incidents involve sexual conduct
 17 or, at least, alleged sexual conduct, Lara did not participate by choice. Any disgust or
 hostility the jurors might have felt would have been lodged not with Lara but with [her
 alleged attackers]. Indeed, if anything, the jurors would have been more likely to
 sympathize with Lara.

18 421 F.3d at 1040-41 (citing *LaJoie v. Thompson*, 217 F.3d 663, 673 (9th Cir. 2000)); *see also*
 19 *Holley*, 568 F.3d at 1100 (citing *Fowler* in holding that “[a]ny prejudice the jury might have
 20 developed as a result of [the] cross-examination would have been to discredit her claims due to
 21 her active sexual imagination, the very type of impeachment that Holley was entitled to engage
 22 in under the Confrontation Clause”). The *Fowler* court also dismissed the prosecution’s claim
 23 that the cross-examination of the prior incidents would be unduly embarrassing to the alleged
 24 victim, noting that it was unclear how it “would be any more embarrassing than Lara’s testimony
 25 regarding the alleged incident involving Fowler,” and holding in any event that “[s]uch minimal
 26 – if any – embarrassment cannot serve as the basis to preclude relevant cross-examination.”
 27 *Fowler*, 421 F.3d at 1041 (citing *Davis*, 415 U.S. at 319-20). *Fowler* also specifically rejected
 28 the government’s claims of other countervailing interests against permitting the cross-

1 examination, explaining that it would not take “an inordinate amount of time” and would not be
2 “confusing to the jury.” *Id.* at 1040.

3 Even where there is substantial other evidence with which to impeach the alleged victim,
4 courts have emphasized that cross-examination regarding other false claims of sexual abuse is
5 not cumulative because it is qualitatively different from any other kind of impeachment. *See,*
6 *e.g., Redmond*, 240 F.3d at 591 (“The evidence of the false charge of forcible rape was not
7 cumulative of other evidence bearing on Heather’s credibility, because none of the other
8 evidence either involved a false charge of being sexually assaulted or furnished a motive for
9 such a charge.”); *see also Averilla*, 862 F. Supp.2d at 995 (noting that “federal Courts of Appeals
10 have concluded that false prior allegations of sexual abuse are distinct from general credibility
11 evidence, and therefore not cumulative”) (citing *White* and *Redmond*).

12 It is also worth noting the practical difficulty in this particular case in excluding cross-
13 examination of the alleged victim regarding her contemporaneous claims of similar sexual abuse
14 by others because they are inextricably intertwined with her accusation against Mr. Hardeman.
15 The alleged victim now claims that she was forcibly raped by “Juan” just a few hours before
16 being encountered by Mr. Hardeman in Mexico in December 2007. She also claims that she was
17 forcibly raped by Carlos in Mexico in June 2008 before being taken into custody by the
18 authorities who then commenced the current prosecution of Mr. Hardeman. During her
19 numerous interviews regarding her interaction with Mr. Hardeman, she also spoke at length
20 about her claims against “Juan” and “Carlos.” Even her Grand Jury testimony in this case
21 addressed these claims of sexual abuse by others.

22 Finally, Mr. Hardeman emphasizes that the evidence he seeks to introduce is limited to
23 *cross-examination* of alleged victim regarding her prior claims of similar sexual abuse by others
24 during the time period in question. He is not seeking to introduce *extrinsic evidence* to prove up
25 the falsity of those claims – such as testimony by other witnesses regarding the alleged facts of
26 those other incidents – which would greatly expand the scope of the current trial. This
27 distinction between cross-examination and extrinsic evidence weighs significantly in favor of
28 granting Mr. Hardeman’s motion. *See, e.g., Nevada v. Jackson*, 133 S. Ct. 1990, 1994 (2013)

1 (distinguishing *Fowler, Holley* and *Olden*, which address *cross-examination*, by noting that “this
2 Court has never held that the Confrontation Clause entitles a criminal defendant to introduce
3 *extrinsic evidence* for impeachment purposes”); *see also White*, 399 F.3d at 26 (“We conclude
4 that, on the present facts, White was entitled to explore the prior accusations on cross-
5 examination. White has narrowed his claim on appeal to cross-examination, and we are not
6 endorsing any open-ended constitutional right to offer extrinsic evidence. Such an excursion
7 requires more witnesses and documents, and so greater risks of confusion and delay; to say that
8 impeachment here would cast light on a motive to lie is not to suggest that prior false accusations
9 are the kind of evidence for which extrinsic evidence has traditionally been admitted.”).

10 CONCLUSION

11 For the aforementioned reasons, the Court should grant Mr. Hardeman’s motion to permit
12 cross-examination of the alleged victim regarding her prior claims of sexual abuse by others in
13 Mexico between December 2007 and June 2008.

14 Dated: June 26, 2013

15 Respectfully submitted,

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18 /s/

19 DANIEL P. BLANK
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